UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

IN THE MATTER OF:	)	Docket No. 10-97-0123-OPA
	)	
Nondalton Water Treatment Plant,	)	Proceeding to Assess
	)	Class I Administrative
	)	Penalty Under Clean Water
	)	Act Section 311,
RESPONDENT	)	33 U.S.C. §1321
	)	
	)	

ORDER GRANTING LEAVE TO AMEND THE ADMINISTRATIVE COMPLAINT

This is a proceeding for the assessment of a Class I administrative penalty under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28, Non-APA Consolidated Rules of Practice for Administrative Assessment of Civil Penalties ("the Consolidated Rules"), 56 Fed. Reg. 29,996 (July 1, 1991), used as procedural guidance for Class I administrative penalty proceedings under Section 311 of the Clean Water Act, 33 U.S.C. §1321. 57 Fed. Reg. 52,704, 52,705 (November 4, 1992).

STATUTORY AND REGULATORY BACKGROUND

Section 311(j)(1) of the Clean Water Act, 33 U.S.C. §1321(j)(1), provides for the issuance of regulations

"establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore facilities, and to contain such discharges . . . ."

The implementing regulations, found at 40 C.F.R. Part 112, apply to

> owners or operators of non-transportation-related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities . . . into or upon the navigable waters of the United States or adjoining shorelines.

40 C.F.R. Section 112.1(b).

Under 40 C.F.R. Section 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. Section 112.7 not later than six months after the facility began operations, or by July 10, 1974, whichever is later, and must implement that SPCC plan not later than one year after the facility began operations, or by January 10, 1975, whichever is later.

PROCEDURAL BACKGROUND

The Unit Manager of Emergency Response and Site Cleanup Unit No. 1 of the Office of Environmental Cleanup of Region 10 of the United States Environmental Protection Agency

(Complainant) initiated this action on September 30, 1997, by issuing an administrative complaint to Nondalton Water Treatment Plant, (Respondent) alleging that Respondent violated the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 and the Clean Water Act. The letter accompanying the administrative complaint provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed the Respondent of its right to a hearing and of the opportunity to seek an extension of the thirty-day period for filing a response.

By memorandum dated October 2, 1997, the undersigned was designated as Presiding Officer in this matter pursuant to §28.16(h) of the Consolidated Rules.

DETERMINATION REGARDING DEFAULT

Under Section 28.20 of the Consolidated Rules, Respondent had thirty days from its receipt of the administrative complaint to file a response, unless the deadline was extended under Section 28.20(b)(1) for the purpose of engaging in informal settlement negotiations.

No response was filed by the Respondent. There is no indication in the administrative record of any extensions of time. The response was therefore due approximately October

31, 1997, depending on the actual date the administrative complaint was received by Nondalton Water Treatment Plant. The Complainant filed a Motion for Default Judgment on May 7, 1998. No reply to the motion was filed by the Respondent. The Respondent has therefore failed to respond to the administrative complaint in a timely fashion and failed to provide any explanation for not filing a timely response.

Respondent's failure to file a timely response to the administrative complaint automatically triggers the default proceedings provision of the Consolidated Rules. Section 28.21(a) of the Consolidated Rules provides:

> Determination of Liability. If the Respondent fails timely to respond pursuant to §28.20(a) or (b) of this Part . . . the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

DETERMINATION WHETHER THE COMPLAINT STATES A CAUSE OF ACTION

To state a cause of action against the Respondent under Section 311 of the Clean Water Act, 33 U.S.C. § 1321, and 40 C.F.R. Section 112.3, Complainant must allege that the Respondent is the owner or operator of an onshore facility that could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, and that the Respondent has

failed to prepare a SPCC plan within six months after the facility began operation.[1]

The term "owner or operator" as it applies to an onshore facility is defined in Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. Section 112.2 as "any person owning or operating" the facility. "Person" is defined in turn in Section 311(a)(7) of the Clean Water Act and 40 C.F.R. Section 112.2 to include "an individual, firm, corporation, association, and a partnership."

The administrative complaint issued to the Respondent alleges as follows:

> (1) Respondent Nondalton Water Treatment Plant ("Respondent") is a non corporation organized under the laws of Alaska with a place of business located at or near Nondalton, Alaska. Respondent is a person within the meaning of Section 311(a)(7) of the Clean Water Act and 40 C.F.R. Section 112.2.

While the administrative complaint alleges that the Respondent is a "person" within the meaning of Section 311(a)(7) of the Clean Water Act and 40 C.F.R. Section 112.2, the specific facts alleged, that the Respondent is a "non corporation," are not sufficient to show that the Respondent falls within the relevant statutory and regulatory definitions

[1]Other violations that could be alleged under Section 311 of the Clean Water Act and 40 C.F.R. Section 112 are omitted, in the interests of simplicity of exposition.

of “person.” To the contrary, they suggest that the Respondent is not a “person” as the term is defined for the purposes of Section 311 of the Clean Water Act and 40 C.F.R. Part 112. The Respondent is presumably not an individual, and is alleged not to be a corporation. No facts are alleged which would allow me to determine that the Respondent is a firm, an association, or a partnership.

Being unable to find that the Respondent is a “person,” I must determine that the administrative complaint fails to state a cause of action.

Section 28.21(a)(2) of the Consolidated Rules provides that if the Presiding Officer determines that the complainant has not stated a cause of action, the Presiding Officer shall either allow the complainant to amend the administrative complaint pursuant to Section 28.18(b)(2) of the Consolidated Rules, or recommend that the Regional Administrator withdraw the complaint. Under the circumstances of this case, where the Respondent has not filed a response to the administrative complaint, and where the Complainant may well be able to amend the complaint so that it states a cause of action, it is appropriate to allow the Complainant to amend the administrative complaint.

ORDER

Pursuant to Section 28.18(a)(2) of the Consolidated Rules, the Complainant is allowed thirty days from the date of this order to file an amended administrative complaint in this matter.

/s/
Steven W. Anderson
Presiding Officer

Date: June 3, 1998